IN THE

Supreme Court of the United States

October Term, 1973

No. 73-992

FRANK L. RIZZO, *et al.*,

Petitioners

v.

STEVEN FARBER, *et al.*,

Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF THE ISSUE PRESENTED

Whether an appeal lies from an adjudication of civil contempt, where the appeal is taken prior to the imposition of sanctions and where the appealing parties are also parties to the underlying, pending, civil suit.

COUNTER-STATEMENTS OF THE FACTS

Petitioners, all police officials and officers, appealed to the court below from a finding of civil contempt for violation of a temporary restraining order entered in conjunction with a duly filed civil complaint. Respondents' motion to quash this appeal was granted by the court below on September 26, 1973, and the propriety of that ruling is challenged by petitioners.

Petitioners concede that their appeal was taken prior to the imposition of damages (Petition, at 7), the trial court having postponed sanctions until the close of testimony in the underlying civil action. (See opinion of the District Court, Petition, A. 19-20). The relief sought in the civil action included money damages and a permanent injunction restraining defendants—including petitioners—from the acts complained of.

Petitioners are all officials and/or police officers of the City of Philadelphia, and both the civil complaint and the violated temporary restraining order applied by their terms to all of them. (See opinion of the District Court, Petition, A. 13). Each petitioner, including those police officers whose identities became known at the contempt hearing, are defendants in the underlying civil action, with consequent rights of appeal at the conclusion of that litigation. Indeed, petitioners themselves concede that their appeal is "interlocutory," (Petition, at 1).

ARGUMENT

Petitioners' appeal to the court below was clearly interlocutory, and was quashed on two well settled grounds: first, the appeal was taken prior to the assessment of damages, e.g., *S.E.C. v. Naftalin*, 460 F.2d 471, 475 (8th Cir. 1972); and, second, contempt adjudications as to parties are reviewable only on appeal from a final judgment and decree in the underlying civil suit, e.g. *S.E.C. v. Naftalin, supra; Hodgson v. Mahoney*, 460 F.2d 326 (1st Cir. 1972); *Western Geophysical Co. of America, Inc. v. Bolt Associates, Inc.*, 463 F.2d 101, 102-3 (2d Cir. 1972); Cf. *Catlin v. United States*, 324 U.S. 229 (1945); *New York Telephone Co. v. Communications Workers*, 445 F.2d 39 (2d Cir. 1971).

A. Petitioners are all parties to the underlying civil action and for this reason their appeal did not lie prior to a final order and decree in that litigation.

Petitioners concede, as they must, that if they were parties to the underlying civil action, their appeal is not permitted at this time. (Petition, at 8).

As is indicated in the opinion of the District Court, the flagrantly violated temporary restraining order applied by its terms, and the provisions of Rule 65(d), Fed.R.Civ.P., to each and every petitioner by virtue of the fact that all are Philadelphia police officers and/or officials. (Petition, A. 13). The injunctive relief sought in the civil complaint is clearly directed at these same Philadelphia police officers, who were continuing to violate the First Amendment rights of plaintiffs at and after the time the TRO was entered. For this reason, any final decrees in this lawsuit will clearly apply to all petitioners, and their contention that they are non-parties to the underlying civil litigation is clearly frivolous.

Petitioners contend that their non-party status arises from respondents failure to amend the pleadings once petitioners' actual identities became known. (Petition at 8). While petitioners do not indicate whether the "pleading"

referred to is the civil complaint as opposed to the petition for civil contempt, their argument, in either case, is factually incorrect. As to the civil contempt petition, their trial counsel stipulated to the actual identity of each "John Doe" contemnor and expressly agreed that their actual names be made a matter of record. (See Transcript 411-413 and stipulation attached hereto at Appendix, A1). This stipulation was entered into *prior* to defense testimony at the contempt hearing, and each petitioner was clearly on notice at that time as to their status both as putative contemnors and as civil defendants; and, more important, as parties entitled to appeal *after* a final order and decree in the underlying civil suit. Moreover, respondents filed a motion to amend the civil complaint by substituting the actual names for the "John Doe" appellations of the original civil complaint. This motion, which would merely conform the civil complaint to the stipulation agreed to by petitioners' counsel, is currently pending in the trial court.

B. The civil contempt sanctions having been deferred pending final rulings in the civil action, the adjudications of civil contempt were not final orders under 28 U.S.C. Sec. 1291.

Contemnor-petitioners concede, as they must, that no civil contempt sanctions have as yet been imposed. (Petition, at 7, A. 19-20). For this reason, even assuming *arguendo* their alleged "non-party" status, their appeals were premature. *Fireman's Fund Ins. Co. v. Myers*, 439 F.2d 834, 838-9 (3rd Cir. 1971); *S.E.C. v. Naftalin, supra.*

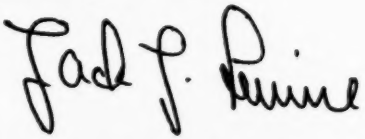
C. Issues unrelated to the appealability of the contempt rulings are not properly raised in this Court.

Petitioners have challenged the "tacit acceptance" by the court below of "John Doe" pleadings. (Petition, at 10-13). No issues relating to "John Doe" pleadings were adjudicated in proceedings before the court below, and the only issue properly raised in this Court relates to the ruling of the Third Circuit quashing petitioners' appeal.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,



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APPENDIX

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FARBER, *et al.*

v.

Civil Action No.
72-2052

RIZZO, *et al.*

STIPULATION

It is hereby stipulated by and between counsel for the parties in this case that the following list of police officers and their respective badge numbers may be entered into the record of this case. See N.T. 411-413.

#4288 Martin Kelly, 90th District
#4038 William Hughes, 90th District
#6812 Ned Wimberly, 90th District
#4158 Melvin Jones, 90th District
#8552 Michael Carducci, Academy
#4345 Ellsworth Kiehn, 91st District
#9771 John Founds, 23rd District
#2751 Raymond Weldon, Marine Unit

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